U.S. Department of Homeland Security
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**U.S. Citizenship
and Immigration
Services**

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FILE:

WAC 05 017 52877

Office: CALIFORNIA SERVICE CENTER   Date: **SEP 2 0 2006**

IN RE: Petitioner:
           Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

[signature]

Robert P. Wiemann, Chief
Administrative Appeals Office

www.uscis.gov

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner is a mathematical and scientific research firm that seeks to employ the beneficiary as an operations research analyst. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the beneficiary qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

We note that, on the Form I-290B Notice of Appeal, counsel states that he is filing the appeal on the beneficiary's behalf. Pursuant to 8 C.F.R. § 103.3(a)(1)(iii), a beneficiary is not an affected party; pursuant to 8 C.F.R. § 103.3(a)(2)(v), an appeal not filed by an affected party must be rejected. Nevertheless, the record contains Form G-28, Notice of Entry of Appearance as Attorney or Representative, showing that the same attorney represents both the petitioner and the beneficiary in this proceeding. Therefore, we consider the appeal to have been properly filed by the petitioner's attorney of record, and we accept the filing for this reason alone, not because the same attorney asserted that he was acting on the beneficiary's behalf.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
>
> > (B) Waiver of Job Offer.
>
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the beneficiary qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The beneficiary offers this description of his work: "Conducts analyses of management and operational issues, and formulates mathematical or simulation models to detect and solve problems utilizing computers or other methods. Prepares model of problem in form of one or several equations that relate constants and variables, restrictions, alternatives, conflicting objectives, and their numerical parameters."

The petitioner submits a copy of a letter from   chief of the Army Research Laboratory (ARL) Information Assurance Center, to top officials of the petitioning company.   states:

> I am writing this letter to express my support of your ATP NIST project. Since we have an ongoing Phase II SBIR, which is directly related to this work, we have a direct and substantial interest in its continued development, and hope to collaborate with you by providing a live and realistic testbed for this innovative intrusion detection technology.

Computer network intrusions have been around for some time now, but recent activities targeted at DoD [the Department of Defense] and other U.S. government organizations have been extremely sophisticated and dangerous. The current state of the art in intrusion detection is woefully inadequate to address this threat. Your work offers innovative algorithmic solutions and a prototype device, which address some of the most pressing failings in network intrusion detection. . . . Your solution will have a long-term and significant impact on the Department of Defense and other U.S. Government agencies in combating cyber-terrorism and improving national security. Commercialization of the system will represent a great benefit for the security of large high-speed corporate networks.

The petitioner also submits a copy of a letter from ███████████████, Director of the Center for Applied Mathematical Sciences at the University of Southern California (USC). This letter, originally written in support of an earlier nonimmigrant petition on the beneficiary's behalf, reads in part:

While at Charles University in Prague . . . [the beneficiary] showed that, in highly dimensional linear statistical models, it is possible to utilize generalized consistent hypotheses testing and the lattice structure of model hierarchies to quickly determine the boundary of a set of all accepted models with a bounded simultaneous significance level. Because it allows one to consider, simultaneously, all proper linear models, this technique is very important in many applications, especially in medical clinical studies where high dimensional problems are very common. . . . This is a significant discovery and gained the attention of the Mathematics community. . . .

At Michigan State [University], his purpose was to study theoretical statistics and probability. [The beneficiary] studied high-dimensional statistical models and modern resampling techniques applied to the very complex field of alpha-stable distributions. . . .

[The beneficiary] was a member of our team at USC from January 2000 to September 2003 as a Research Associate. During this period, he made major contributions to . . . three important projects as one of the principal investigators. One project funded by the U.S. Office of Naval Research is related to the development of algorithms and software for Infrared Search and Track Systems as a part of the Navy's program on the enhanced survivability of DD21 (the U.S. Navy's 21st century land attack destroyer). . . .

The second project which was funded by DARPA [Defense Advanced Research Projects Agency] . . . was created to detect and identify cyber attacks, unauthorized network intrusions, and impending system failures. . . .

The third project funded by the U.S. Office of Naval Research was related to developing new methods and algorithms for image stabilization and image resolution enhancement as a part of the Naval UAV (Unmanned Aerial Vehicles) project. . . .

> [The beneficiary's] expertise was extremely valuable for all three projects. He has assisted us in improving our understanding of multiresolution analysis and wavelets decomposition in applications to stochastic models in signal processing. . . . This was not trivial, because the research problems that we are studying entail the use of techniques from many different disciplines including signal processing and dynamical stochastic systems.
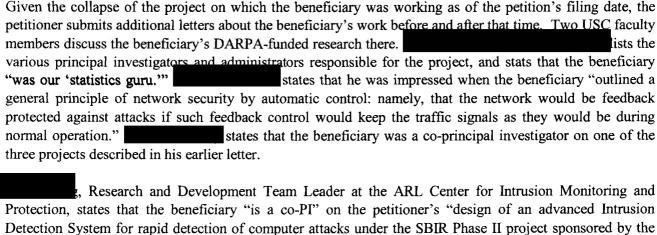
The petitioner submits copies of published job announcements and a "Job Opening Notice" that "is being provided as a result of the filing of an application for permanent alien labor certification." This last document implies that the petitioner has, in fact, applied for labor certification. Counsel states that a waiver is in order because "current delays in the processing of labor certifications will prevent vital services from being rendered to the United States in that the alien will reach the six year limit on his H-1B visa on February 23, 2005, and the employer has not been able to find a worker with the alien's skills." As of the date of adjudication of the appeal, February 23, 2005 has come and gone, and therefore any arguments regarding the urgency of that impending date are moot. More generally, if the national interest waiver had been devised simply as a convenience for aliens nearing the expiration of their nonimmigrant status, then employers would have little incentive to apply for labor certification; they could simply wait until the expiration date was imminent, and then request a waiver on the grounds that insufficient time remained to apply for labor certification.

On April 25, 2005, the director issued a request for evidence (RFE), stating:

> Most of the supporting documentation appear[s] to be witness letters from current and/or former employers and/or colleagues. The letters enumerate the beneficiary's accomplishments regarding specific projects, rather than the beneficiary's contributions to his field of endeavor. The letters were written by individuals who became aware of the [beneficiary's] work because of their association with the [beneficiary]. Their subjective statements that the [beneficiary's] work has attracted attention on its own merits cannot suffice to establish such attention.

The director requested "evidence, **through objective sources**, [to] persuasively establish that the [beneficiary's] work has had a significant impact on his or her field of endeavor" and "was not merely following instructions issued to him or her by superiors, but rather he was exercising considerable influence over not only the execution but also the direction of the projects with which he or she was involved."

In response to the RFE, the petitioner submits copies of previously submitted letters regarding the importance of the petitioner's ATP NIST project. Counsel states: "Congress did not fund [the petitioner's] project due to budgetary limitations. However, [the petitioner's] current . . . projects for the Department of Energy and the U.S. Army incorporate much of the research and analysis involving complicated mathematical modeling that the proposed ATP NIST project did." Thus, the waiver application originally rested, in large part, on the beneficiary's involvement in a project that was subsequently abandoned for lack of funding. Counsel's assertion that the project will "likely . . . be resurrected in the near future" is unsupported speculation.

Given the collapse of the project on which the beneficiary was working as of the petition's filing date, the petitioner submits additional letters about the beneficiary's work before and after that time. Two USC faculty members discuss the beneficiary's DARPA-funded research there. ███████████████████ lists the various principal investigators and administrators responsible for the project, and stats that the beneficiary "was our 'statistics guru.'" ████████████ states that he was impressed when the beneficiary "outlined a general principle of network security by automatic control: namely, that the network would be feedback protected against attacks if such feedback control would keep the traffic signals as they would be during normal operation." ████████████ states that the beneficiary was a co-principal investigator on one of the three projects described in his earlier letter.

████████████, Research and Development Team Leader at the ARL Center for Intrusion Monitoring and Protection, states that the beneficiary "is a co-PI" on the petitioner's "design of an advanced Intrusion Detection System for rapid detection of computer attacks under the SBIR Phase II project sponsored by the U.S. Army. . . . Changes to key members of the staff at this point may adversely impact the return on the Army's R&D investment." ████████████ President of the petitioning company, states that the beneficiary "is a principal performer on [a] recently awarded US DOE SBIR Project for the development of new software to protect DOE networks from the cyber terrorism. . . . [The beneficiary] actively participates in other contract[s] awarded to my company by US Army."

The director denied the petition on August 24, 2005. The director acknowledged the intrinsic merit and national scope of the beneficiary's work, but found that the petitioner had failed to comply with the director's request for independent evidence of the importance of the beneficiary's work. The director found that the petitioner had failed to establish that the beneficiary stands apart from others in his field to an extent that would justify the special benefit of a national interest waiver.

On appeal, counsel contends that "the accomplishments of the beneficiary were not properly evaluated" in the denial notice, and that the director "did not reference the documentation submitted in response to the Request for Evidence." The director, however, quoted at some length from two of the letters submitted in response to the RFE, and most of what remained of the petitioner's response consisted of copies of previously submitted letters. Thus, even a cursory reading of the denial notice refutes the claim that the director "did not reference" those materials.

The petitioner submits a new letter from████████████, now identified as Chief of the Center of Intrusion Monitoring and Protection. This new letter is essentially a modified version of his earlier letter; it contains no new information.

████████████, Distinguished R&D Staff at Oak Ridge National Laboratory, states that the beneficiary "is the Co-Principal Investigator of our new DOE SBIR network intrusion detection project entitled 'Scalable Intrusion Detection System for Rapid Global Detection of Network Attacks.' I have personally first met [the beneficiary]during our initial meeting regarding the project at DOE in August 2005 [but] I was aware of his . . . previous work." This letter indicates that the "initial meeting regarding the project" took place the same month that the director denied the petition.

The petitioner submits copies of articles co-authored by the beneficiary and his mentors at USC, including ███████████████, who is also a principal of the petitioning company. Counsel observes that these articles were "subject to peer review." Counsel does not show that peer review is a rare privilege, rather than a standard procedure, in the publication of scholarly articles in the petitioner's field. Regarding one of the beneficiary's articles, ██████████████████ of the University of Connecticut, Editor of *Sequential Analysis* and an Associate Editor at *Statistical Methodologies*, states:

> I have recently evaluated the research work of [the beneficiary] during the confidential review process of his scientific article that was accepted for publication in the international journal, *Statistical Methodologies*, on August 3, 2005. . . . The article was originally submitted on December 29, 2004 and it underwent exhaustive scrutiny by several international experts anonymously before I recommended it for publication in the journal, *Statistical Methodologies*.

> I was very impressed by the research results presented in the publication and by [the beneficiary's] previous research in extremely important areas of network security, image processing, target tracking, and mathematical statistics. . . .

> [The beneficiary's] article . . . will be published in 2006 in a special issue of *Statistical Methodologies* that will be dedicated to this article alone. This is an extremely rare honor that is awarded only to an exceptionally strong scientific article laying the foundation of new research or novel application in the field. This article certainly qualified on all fronts.

> In addition to [the beneficiary's] article, the special issue . . . will also include detailed discussions of the research results that were prepared by 12 internationally leading experts in the field. I personally suggested that we label this article a "Discussion Article" because of its fundamental nature. . . .

> I strongly believe that the total package is astounding and that any serious researcher will appreciate the tremendous value of this material. . . .

> I believe that it would be impossible to find another scholar like [the beneficiary].

The record contains copies of the beneficiary's *Statistical Methodologies* article and commentary articles to be published alongside it.

There is something to be said for ██████████████ characterization of this special issue as a "rare honor." At the same time, we cannot ignore that the beneficiary's article was not submitted for publication until more than a month after the filing of the petition, and the special issue of *Statistical Methodologies* had not yet been published as of the filing of the appeal in September 2005. Prior to the appeal, the record did not contain any mention of the beneficiary's article, let alone the special issue *Statistical Methodologies*.

The AAO cannot ignore that, at the time the petitioner filed the petition, the waiver claim rested primarily on the beneficiary's involvement in a particular Defense project for which funding subsequently failed to materialize. The response to the RFE stressed the beneficiary's involvement in projects involving related issues, and the strongest evidence submitted on appeal concerns an article that did not yet exist at the time of filing, that was not yet published at the time of the appeal. This continuous metamorphosis of the grounds underlying the waiver claim means that the appeal rests, to a large extent, on information and evidence that had never been brought to the director's attention prior to the denial. Under such circumstances, it is impossible to conclude that the director erred by failing to anticipate the future submission of such evidence. The special journal issue, and the beneficiary's involvement in new projects, all occurred well after the petition's filing date and thus cannot retroactively establish eligibility. *See Matter of Izummi*, 22 I&N Dec. 169 (Comm. 1998), and *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971), which require that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition. We note the argument that these projects involve the same skills that the petitioner touted in the initial submission, but it does not follow that the skills themselves are self-evident proof of eligibility, or that the director should have been able to predict these projects based on what was originally presented for review.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States. At best, the waiver application appears to have been premature. If the petitioner is of the opinion that developments subsequent to the filing date establish the beneficiary's eligibility for the waiver, then the proper course of action would be to file a new petition with a new waiver application, allowing the director to review these developments at the outset rather than having them surface for the very first time on appeal.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.